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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 542

E. W. WIGGINS AIRWAYS, INC.,
PETITIONER,

v.

MASSACHUSETTS PORT AUTHORITY,
BUTLER AVIATION — BOSTON, INC.,
and BUTLER COMPANY,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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MASSACHUSETTS PORT AUTHORITY,
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and BUTLER COMPANY,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on June 15, 1966.

Citations to Opinions Below

The memorandum opinion of the United States District Court for the District of Massachusetts is unreported and

is printed in the Record Appendix, p. 46.[1] The opinion of the Court of Appeals for the First Circuit, printed in Appendix A hereto, infra, pp. 1a-8a, is reported in 362 F.2d 52 (1966).

Jurisdiction

The judgment of the Court of Appeals was entered on June 15, 1966. Appendix A hereto, infra, p. 8a. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether the antitrust laws apply to the actions of a state-created port authority which is not subject to supervision by the state.
2. Whether the facts alleged make out a case of conspiracy under the antitrust laws.
3. The petitioner raises the points (a) that the Authority is acting in a proprietary capacity and (b) that immunity from suit, if any, enjoyed by the Authority does not apply to the co-respondents under the particular circumstances of this case and intends to urge them if certiorari be granted.

Statutes Involved

The Federal Antitrust Statutes involved are Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C. §§ 1,

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[1] The petitioner's record appendix filed in the Court of Appeals is referred to herein as R. followed by the appropriate page number. The record appendix of respondents, Butler Aviation—Boston, Inc. and Butler Company and the petitioner's supplemental record appendix are not referred to herein as they concern only questions of limitations and venue not considered by the Court below.

2 as amended and Sections 4 and 16 of the Clayton Act, 38 Stat. 730, 15 U.S.C. §§ 15 and 26, as amended, the pertinent parts of which are set forth in footnotes to the opinion of the Court of Appeals in Appendix A hereto, infra, pp. 1a, 2a.

The Massachusetts statute involved is an enabling act creating the respondent, Massachusetts Port Authority, Chapter 465 of the Acts of 1956, as amended. In 1956 the Supreme Judicial Court of Massachusetts submitted an opinion to the Senate (Massachusetts) on the then pending bill creating the Massachusetts Port Authority. *Opinion of the Justices,* 334 Mass. 731 (1965), 136 N.E. 2d 223. The thirty closely printed pages of the bill were summarized by that Court. That summary is set forth in Appendix B hereto, infra, pp. 9a-13a, and contains that which is pertinent to the issues here presented. Relevant excerpts from that opinion are also printed following the summary. (Appendix B, hereto, infra, pp. 13a-15a)

Pertinent parts of the Federal Aviation Agency Policy Statement on Exclusive Rights at Airports, Federal Register, Vol. 30, 208, October 27, 1965, including Pertinent Parts of Section 308 (a) of the Federal Aviation Act of 1958, as amended, 72 Stat. 750, 49 U.S.C. 1349 are set forth in Appendix C hereto, infra, pp. 16a-17a.

Statement of the Case

This litigation involves the attempted monopolization of privately owned and operated businesses called "fixed base operations" at Logan Airport in Boston, Massachusetts.

> "A fixed base operation is one that provides facilities, fuel, equipment, supplies and services at an airport which are used by aircraft, crews, passengers and in-

handling freight connected therewith. *It is vital to air transportation''*. (Emphasis supplied). Opinion of Court of Appeals Appendix A, hereto infra, p. 2a, footnote 2.

The petitioner's business at Logan was totally destroyed as a result of the acts of which it complains.

The petitioner brought the action in the United States District Court for the District of Massachusetts under the antitrust laws in which the petitioner alleged that the respondents violated §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2). The complaint as amended sought threefold damages, costs and attorney's fees pursuant to § 4 of the Clayton Act (15 U.S.C. § 15) and injunctive relief pursuant to § 16 of the Clayton Act (15 U.S.C. § 26). Jurisdiction is founded on these latter two statutes and 28 U.S.C. § 1337.

The petitioner, E. W. Wiggins Airways, Inc., a Massachusetts corporation, brought its original complaint on March 8, 1963, against the respondent Massachusetts Port Authority (Authority) and the respondent Butler Aviation - Boston, Inc. (Butler-Boston), an Illinois corporation (Docket, R. 1) (R. 5). The petitioner moved to add the respondent Butler Company d/b/a Butler Aviation, also an Illinois corporation, (Butler) as a defendant which was allowed on April 12, 1965.

A hearing was held on respondents' motions to dismiss on December 20, 1965. (Docket, R. 4). The District Court entered a Memorandum of Decision on Defendants' Motions to Dismiss on December 28, 1965 and a Judgment of Dismissal on January 5, 1966 (R. 46). From this Judgment of Dismissal the petitioner appealed (R. 47).

On June 15, 1966 the Court of Appeals affirmed the dismissal of the amended complaint by the District Court. (Appendix A, hereto, infra, p. 1a).

The amended complaint[2] includes the following allegations: At an airport a "fixed base operation" is a business servicing commercial and private flying and is engaged in interstate commerce (R. 7). The relevant market is confined to the geographic boundaries of Logan Airport (R. 9). For many years the petitioner and others had competed at Logan Airport as fixed base operators in a safe and efficient manner (R. 8). The respondent Authority took over ownership and control of Logan in 1959 (R. 7). Petitioner and its principal competitor Van Dusen Aircraft Supplies of New England, Inc. (Van Dusen) for years had conducted their competing fixed base operations in adjacent hangars at Logan under successive leases from the Authority's predecessors in title (R. 8). Petitioner's lease expired December 1959 and Van Dusen's was to expire on December 1961 (R. 8). In late 1959 petitioner sought a new lease or a tenancy at will pending efforts to get more suitable facilities on Logan (R. 9). The Authority permitted petitioner to remain at its then location only as a tenant-at-will on a month to month basis (R. 9). In early 1960 the Authority and the respondent Butler entered into a conspiracy whereby the Authority would refuse new leases to petitioner and Van Dusen and would exclude them from Logan and Butler would take over the petitioner's and Van Dusen's businesses and become the sole and exclusive fixed base operator (R. 10). Butler was an Illinois corporation which had never done business at Logan and was not authorized to do business in Massachusetts (R. 10). The Authority as owner of Logan was in a position to and did control or affect competition between the fixed based operators (R. 11). After soliciting proposals from various fixed base operators regarding the leasing of properties at Logan for fixed base opera-

[2] Hereinafter called complaint.

tions, the Authority in early 1961 in accordance with the conspiracy selected Butler to be the sole and exclusive fixed base operator at Logan to take over petitioner's and Van Dusen's businesses (R. 12). Pursuant to the conspiracy petitioner was forced out of Logan by the Authority in mid-April 1961; was forced to sell to Butler its equipment at Logan for what it could get; and was forced to turn over its hangar, employees and business at Logan to Butler (R. 12). Petitioner and Van Dusen appealed to the Federal Aviation Authority (F.A.A.) in March 1961 (R. 13). In May 1961 the respondent Butler-Boston was incorporated in Illinois and in early June registered to do business in Massachusetts (R. 13). It was formed to carry out the plan and agreement entered into by the Authority and Butler (R. 13). In September 1961 a lease retroactive to July 1, 1961 between the Authority and Butler-Boston was executed the effect of which was that Butler-Boston would take over the facilities of petitioner and Van Dusen and become the sole and exclusive fixed base operator at Logan (R. 14). In February 1962 the F.A.A. ruled that the substitution of a single fixed base operator was in conflict with the Federal Aviation Act and instructed the Authority to permit Van Dusen to stay on at Logan and to take steps to negotiate with all interested parties to correct the situation then existing at Logan (R. 14). Thereafter, efforts were made by petitioner to return to Logan but the Authority as late as September 1962 refused to permit fueling privileges to petitioner (R. 14, 15). As fueling is a major and essential part of a fixed base operation, petitioner's return to Logan under this restriction would be economically unsound (R. 15). Petitioner, thereby, was denied entrance to Logan by the Authority (R. 15). The exercise by the Authority of its power to exclude competition at Logan was not justified by reasonable business requirements and was arbitrary,

capricious and unreasonable and in bad faith (R. 15). Petitioner was not only damaged by the loss of its business at Logan but suffered consequential damages to its remaining fixed base operation business at Norwood Airport (Norwood, Massachusetts) which had been operated by petitioner in a manner complementary to that at Logan (R. 15). Only the intervention of the F.A.A. prevented the respondents from fully carrying out their conspiracy to monopolize the fixed base operations at Logan but the F.A.A. intervention came too late to save petitioner (R. 16).

The Court of Appeals affirmed the dismissal of the complaint by the District Court apparently on the following reasoning:

> 1. The Authority was exercising a valid governmental function as an instrumentality or agency of the state pursuant to the legislative mandate imposed upon it to operate and manage the airport and establish rules and regulations for its use and was not acting in a proprietory capacity;
>
> 2. The antitrust laws are aimed at private action, not governmental action. The fact that the statute creating the Authority empowered it to sue and be sued in its own name does not permit a private antitrust suit because Congress never intended to impose liability in the first place.
>
> 3. The facts alleged in the complaint do not make out a case of conspiracy. This was a simple agreement or arrangement with Butler to replace petitioner and Van Dusen with Butler and make Butler the sole and exclusive fixed base operator at Logan.
>
> 4. If the Authority's conduct was lawful then the other respondents' conduct was not unlawful.

Reasons for Granting the Writ

This case raises the important and novel question whether the rapidly growing commerce of civil aviation can be exposed to the grasp of the private monopolist without application of the antitrust laws merely because an airport is publicly owned. Nearly one-third of this country's airports are publicly owned.[3]

The remarkable growth at home and abroad of air traffic in both air carrier and general aviation has led to larger airports and to more and better facilities being made available at those airports. These airports' influence upon the economic growth of communities has encouraged local public ownership to exploit the great commercial potential presented by this local, national and international air traffic.

The desirability of public ownership of local airports, however, should not serve to thwart the fundamental national economic policy represented by the antitrust laws. See: *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 217 (1966). The importance of the problem is pointed up by the recent policy statement of the Federal Aviation Agency, Federal Register, Vol. 30, No. 208, p. 13661, October 27, 1965, generally prohibiting exclusive rights in the conduct of aeronautical activities at public airports on which Federal funds have been expended. (Appendix C, infra, p. 16a). In the policy statement, an aeronautical activity is defined as "Any activity which involves, makes possible, or is required for the operation of aircraft or which contributes to or is required for the safety of such operations." The activities classified therein as aeronautical activities are those activities usually conducted in the business of a fixed base operator.

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[3] See: FAA Statistical Handbook of Aviation, 1965 Edition, Federal Aviation Agency, pp. 5 and 6.

(Complaint, par. 8, R. 7; Opinion of Court below, Appendix A hereto, infra, p. 2a; F.A.A. Policy Statement, Section 5(b) (Appendix C hereto, infra, p. 17a).

Interestingly, ground transportation (taxis, car rentals, limousines); restaurants; barber shops; and auto parking lots are not considered in the policy statement as aeronautical activities. (Appendix C hereto, infra, p. 17a).

In other words there are certain activities at an airport conducted by fixed base operators which are essential to air commerce and other activities as restaurants, barber shops, auto parking and ground transportation which, while desirable and useful mostly to passengers, are not essential to air commerce. The Court below failed to recognize the distinction as evidenced by its citing *Donovan* v. *Pennsylvania Company,* 199 U.S. 279 (1905) and *Parmelee Transportation Company* v. *Keeshin,* 292 F.2d 794 (7th Cir. 1961), cert. denied, 368 U.S. 944, rehearing denied, 368 U.S. 972 (1962), both involving exclusive taxi service rights at railroad stations.

Air traffic, whether commercial or private, must depend on fixed base operations at airports to sustain its operation. An exclusive fixed base operator at any airport is well positioned to extract his toll from the air traffic using that airport as well as from those outside the airport such as petroleum suppliers, airplane manufacturers, and parts distributors who desire to sell to those flying to and from that airport. The inherent evils of such an exclusive arrangement are legion.

The emergence of many public independent authorities across the nation and their effect on those engaged in various channels of commerce make it important for this Court to determine whether their actions are subject to the antitrust laws where their activities are not directed by the state creating them or where their conduct is arbitrary, capricious or unreasonable. To hold as the Court

below has done that such authorities may act without any supervision by the state creating them and without being subject to the antitrust laws leaves no guide lines for the protection of others engaged in commerce.

The novelty of the issue presented is evident from the fact that there appear to be no reported cases substantially indistinguishable from this case. Nevertheless, the issuance of the FAA policy statement indicates that the problems are fermenting generally and that the petitioner's injury is not an isolated event of only local concern.

The Court below has rejected the petitioner's claim on the basis that *Parker* v. *Brown,* 317 U.S. 341, 350-51 (1943), *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight Inc.,* 365 U.S. 127 (1961) and the other cases cited hold that the Sherman Act does not apply to the activities of a state or the activities of its officers directed by the state legislature. (Appendix A hereto, infra, pp. 6a, 7a). This holding is in direct conflict with that of *Harman* v. *Valley National Bank of America,* 339 F.2d 564, 566 (9th Cir. 1964) in which the Attorney General of Arizona was named in an antitrust case as a participating conspirator to place a financial institution in receivership. In discussing *Noerr* and *Parker* v. *Brown* the Court said: "Moreover, the complaint alleges that the acts of the Attorney General were those of a participating conspirator. In *Parker* v. *Brown,* 317 U.S. 341, 351, 63 S. Ct. 307, 314, 87 L. Ed. 315 (1943), the Court specifically reserved the question of the applicability of the Sherman Act to the case of 'a state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade', and *Noerr* does not hold that the Act would be inapplicable in such a situation." In the present case, the petitioner expressly alleges that the Authority was a participant in a private agreement with Butler and Butler-Boston for restraint of trade. Fur-

thermore, the enabling act and its interpretation by the state court expressly provides that the Authority "... shall not be subject to the supervision or regulation of the Department of Public Works or any other department, commission, board, bureau or agency of the commonwealth ..." (Appendix B hereto, infra, p. 9a). For these two reasons, the *Parker* v. *Brown* reasoning does not preclude the application of the antitrust laws to the activities of the Authority. The opinion of the Court below also appears to be in conflict in principle both with *Parker* v. *Brown* and with this Court's holding that "... (N)o state can endow any of its corporations, or any combination of its citizens with authority to restrain interstate or international commerce, or to disobey the national will as manifested in legal enactments of Congress". *Northern Securities Co.* v. *United States,* 193 U. S. 197, 350. See: *United States* v. *California,* 297 U.S. 175, 184-185.

The Court below further held "... we do not reach any question of immunity, since there was no attempt on the part of Congress to impose liability in the first place". (Appendix A hereto, infra p. 7a). Congress certainly showed its intent to prohibit the grant of an exclusive right to conduct an aeronautical activity on an airport on which Federal funds have been expended. Section 308(a), Federal Aviation Act of 1958, as amended, 72 Stat. 750, 49 U.S.C. 1349 (pertinent part, Appendix C hereto, infra p. 16a, FAA Policy Statement Sec. 4) It was surely not the intent of Congress to preserve economic freedom on public airports receiving Federal grants and abandon it elsewhere.

The antitrust laws do not contain any statutory exemption for public authorities. Repeal of the antitrust laws by implication is not favored. *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 357 (1962); *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 217 (1966).

Even a labor union having an express statutory exemption may become liable if it joins a conspiracy to eliminate competition, even though the union's part of the scheme is limited to wage matters. *United Mine Workers* v. *Pennington*, 381 U.S. 657, 663-665. *Allen Bradley Co.* v. *Union*, 325 U.S. 797.

Section 3 of the statute creating the Authority empowers it to sue and be sued in its own name. (Appendix B hereto, infra, p. 10a). In its advisory opinion, the Supreme Judicial Court of Massachusetts cited *Johnson-Foster Co.* v. *D'Amore Construction Co.*, 314 Mass. 416, 419 and compares the Authority's status to that of a housing authority. (Appendix B hereto, infra, p. 14a). In the *Johnson-Foster Co.* case the Court said of the housing authority, "It is an instrumentality of government, but it is also a corporation having the contracting powers of a corporation and suable as such in the same manner as a private corporation." (p. 419, supra). In *Costonis* v. *Medford Housing Authority*, 343 Mass. 108, 113, the Court said, "A housing authority has the contracting powers of a private corporation. . . . . It is 'liable in contract or in tort in the same manner as a private corporation'." A housing authority is not the agent or a department of the town creating it. *Clinton Housing Authority* v. *Finance Committee of Clinton*, 329 Mass. 495, 499. In *Commonwealth* v. *Biddescombe*, 347 Mass. 427, 429 (1964) the Court reaffirmed its description of the Port Authority by saying, "Moreover, Logan (St. 1956, c. 465, §5) is owned and operated by the Massachusetts Port Authority which is an entity in itself and has an existence apart and distinct from that of the Commonwealth."

The case of *Commonwealth* v. *Massachusetts Turnpike Authority*, 346 Mass. 250, clearly shows that an authority is not the alter ego of the Commonwealth. In that case the Commonwealth had to resort to the courts to declare

illegal and restrain certain takings of land by the Turnpike Authority from the Metropolitan District Commission, a department of the Commonwealth. There is almost verbatim similarity between the statutes creating and empowering the Turnpike Authority, St. 1952, c. 354, Sec. 3, par. 1, and the defendant Port Authority, St. 1956, c. 465, Sec. 2, par. 1.

Were the Turnpike Authority in fact and in law an arm of the Commonwealth, it seems unlikely that the Commonwealth would have to go to Court to prevent one of its "arms" from performing illegal acts.

In short, this is an action against the Massachusetts Port Authority—it is not an action against the Commonwealth of Massachusetts. See: *Gerr* v. *Emrich*, 283 F.2d 293 (3rd Cir. 1960), Cert. denied, 256 U.S. 817 (1961).

Thus, the state legislature and highest state court have not seen fit to impose any restrictions on the suability of the Authority. The Court below has arrived at its decision by repeal of the antitrust laws only by implication.

The Court below further ruled that a conspiracy was not sufficiently alleged in the complaint and said, "This was a simple agreement or arrangement. The fact that it was exclusive does not under these circumstances necessarily make it a conspiracy or make it illegal", (Appendix A hereto, infra pp. 7a, 8a.). The essence of an antitrust conspiracy is a combination or agreement to violate or to disregard the law. The complaint must be construed in the manner most favorable to the petitioner and there must be borne in mind the policy that, unless there is no doubt as to the result, cases should be disposed of upon their merits. There are no special rules of pleading in antitrust cases and Rule 8, F.R. Civ. P., is as applicable here as in any other case. The Courts should be liberal in construing antitrust complaints. Whether the charges be called allegations of fact or mere conclusions of the

pleader, they must be taken into account in deciding whether a claim for relief is stated. One purpose of Rule 8 was to get away from the highly technical distinction between statements of fact and conclusions of law, and other technicalities, that often made a party's success depend upon the skill of his counsel as a pleader rather than upon the merits of his case. The official forms and Rules 1 and 84, confirm this view. Most of the forms contain more "legal conclusions" than they do "facts". See: *Walker Distributing Co.* v. *Lucky Lager Brewing Co.*, 323 F.2d 1, 3-4 (1963); *Poller* v. *Columbia Broadcasting Co.*, 368 U.S. 464, 473 (1961); *Radiant Burners* v. *Peoples Gas Co.*, 364 U.S. 656, 660 (1960).

To state a claim upon which relief can be granted under Sections 1 and 2 of the Sherman Act, allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires. *Radiant Burners* v. *Peoples Gas Co.*, 364 U.S. 656, 660 (1960).

The complaint meets the above requirements because it shows: Healthy competition in "fixed based operations" in interstate commerce at the General Edward Lawrence Logan International Airport (Logan), the relevant market, had existed for years before the Authority took over. The area of effective competition is clearly confined to the geographic boundaries of Logan. Since the Authority owned and controlled Logan and the competing fixed base operators were dependent on leasing privileges to remain at Logan, the Authority had the power to control or affect competition in the market or business of conducting fixed based operations at Logan. The Authority and Butler Aviation conspired and agreed to monopolize that business. The Authority drove Wiggins out and turned its business over to Butler Aviation. Butler-Boston was there-

after created to carry out the conspirators' plan. The Authority in driving out Wiggins and attempting to drive out Van Dusen attempted to exercise unreasonably its monopoly power. Wiggins was damaged by the loss of its business at Logan and by the damage to its remaining business at Norwood.

The petitioner in support of its case relies on *Poller* v. *Columbia Broadcasting*, 368 U.S. 464 (1961) involving a cancellation of a television station affiliation and *Gamco, Inc.* v. *Providence Fruit & Produce Bldg.*, 194 F.2d 484 (1st Cir. 1952) cert. denied, 344 U.S. 817, involving the ousting of a tenant from a wholesale produce market. Under *Poller*, if the Authority's attempted replacement of the petitioner and its competitor Van Dusen by Butler and Butler-Boston was part of and parcel of unlawful conduct or agreement with Butler and Butler-Boston or was conceived in a purpose to unreasonably restrain trade, control a market, or monopolize, then such conduct might well run afoul of the Sherman Act. See: *Poller*, supra, p. 469.

Under *Gamco*, "the conjunction of power and motive to exclude with an exclusion not immediately and patently justified by reasonable business requirements establishes a *prima facie* case of the purpose to monopolize." (*Gamco*, supra, 488). The complaint alleges the conspiracy between Butler and the Authority to monopolize and that the exercise of its monopoly power by the Authority was not immediately and patently justified by reasonable business requirements, that its acts were arbitrary, capricious or unreasonable and that the same were done in bad faith. (R. 10, 11, 15). For the purposes of testing the complaint, the allegations must be taken as true. The respondents have the duty to come forward and justify Wiggins' ouster. *Gamco*, 488, supra.

Conclusion

For the foregoing reasons this petition should be granted.

Respectfully submitted,

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Appendix A

United States Court of Appeals
For the First Circuit

No. 6694.

E. W. WIGGINS AIRWAYS, INC.,
PLAINTIFF, APPELLANT,

v.

MASSACHUSETTS PORT AUTHORITY ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge,*
McENTEE and COFFIN, *Circuit Judges.*

Arthur H. Bloomberg, with whom *Grabill, Ley & Butterworth* was on brief, for appellant.

Warren F. Farr, with whom *Donald R. Grant* and *Ropes & Gray* were on brief, for Massachusetts Port Authority, appellee.

John M. Hall, with whom *Conrad W. Oberdorfer* and *Thayer Fremont-Smith* were on brief, for Butler Aviation-Boston, Inc., appellee.

John R. Halley for Butler Company, appellee.

OPINION OF THE COURT.

June 15, 1966.

McENTEE, *Circuit Judge.* This is a suit for alleged federal antitrust act violations brought by E. W. Wiggins Airways, Inc. under 15 U.S.C. §§ 15, 26 [1] against the Massa-

[1] 15 U.S.C. § 15 provides as follows:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

15 U.S.C. § 26 provides in pertinent part as follows:

chusetts Port Authority (the Authority), Butler Aviation-Boston, Inc. (Butler-Boston), and Butler Company (Butler). It involves fixed base operations, so-called,[2] at Logan Airport in Boston. The complaint[3] alleges that the defendants entered into a conspiracy, combination or contract in restraint of trade or commerce in that they attempted to establish a sole and exclusive fixed base operation at Logan in violation of Section 1 of the Sherman Act[4] and that each of them attempted to monopolize and combined or conspired to monopolize said business or operation in violation of Section 2 of the Sherman Act.[5]

The district court dismissed the suit on the ground that the complaint on its face does not state a claim upon which relief can be granted. Plaintiff appeals.

The facts stated most favorably to the plaintiff are as follows. For many years prior to February 1959 when the Authority took over the ownership, management and control of Logan, plaintiff and a competitor, known as Van Dusen,[6] conducted fixed base operations there. Both had

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"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, ..."

[2] A fixed base operation is one that provides facilities, fuel, equipment, supplies and services at an airport which are used by aircraft, crews, passengers and in handling freight connected therewith. It is vital to air transportation.

[3] Actually it is an amended complaint but the term complaint as used in this opinion means amended complaint.

[4] § 1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, ... is declared to be illegal: . . . ." 15 U.S.C. § 1.

[5] § 2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, . . . shall be deemed guilty of a misdemeanor, ..." 15 U.S.C. § 2.

[6] Its correct corporate name is Van Dusen Aircraft Supplies of New England, Inc.

leases from the State Airport Management Board.[7] Plaintiff's lease expired on December 31, 1959—Van Dusen's on December 31, 1961. Shortly before the expiration of plaintiff's lease, it asked the Authority for a renewal which was refused, but the plaintiff was allowed to continue its operation at the airport as a tenant at will on a month to month basis. The events that followed form the basis of this complaint and for that reason we relate them in some detail. In mid July 1960 the Authority wrote to a number of fixed base operators, including Van Dusen and the plaintiff, to the effect that it wished to enter into a lease for the fixed base operation at Logan and invited expressions of interest. Among those contacted was the defendant, Butler, who was conducting similar operations at several airports throughout the country. Plaintiff promptly informed the Authority of its interest and shortly thereafter submitted a proposal. In November both the plaintiff and Van Dusen appeared before the Authority and each of them expressed its readiness to undertake the operation.

In January 1961 plaintiff received another letter from the Authority stating that it had deemed it necessary that this proposed facility be conducted by a single operator but stated that it may negotiate with one or more firms before signing a lease and enclosed a list of requirements and qualifications. In response to this letter, plaintiff again advised the Authority that it was ready, able and willing to take on the operation but heard nothing further from the Authority until it received a letter dated February 10 informing it that Butler had been selected. About ten days later the Authority gave the plaintiff notice to vacate the airport premises occupied by it in not more than ninety days. Plaintiff claims that in order to comply with this

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[7] The Authority's predecessor that had operated the airport as an agency of the Commonwealth for several years.

eviction notice [8] it was forced to sell its business and equipment at Logan which Butler was able to buy at a very low figure. Subsequently the defendant, Butler-Boston, was formed as a subsidiary of Butler Company. A lease was then executed between the Authority and Butler-Boston whereby the latter would take over the Wiggins hangar as of July 1, 1961, and the Van Dusen hangar as of January 1, 1962.

Shortly after the plaintiff received the eviction notice it complained to the Federal Aviation Authority that the Port Authority's decision to establish Butler as its sole and exclusive fixed base operator violated the Federal Aviation Act.[9] Van Dusen joined in this complaint and in February 1962 the Administrator of FAA instructed the Authority to grant Van Dusen an extension allowing it to remain at Logan. In the same proceeding he also instructed the Port Authority to take steps to negotiate with all interested parties to correct the situation complained of. However, the FAA's intervention came too late to save the plaintiff. By that time it had sold its business and equipment at Logan and had departed from the airport. Shortly thereafter plaintiff endeavored to return to Logan but the Authority refused to grant it fueling privileges which rendered its return economically unwise. Van Dusen continues as a fixed base operator at Logan along with Butler-Boston.

Plaintiff contends that early in 1960 the Authority, through one of its members, contacted Butler and as a result of subsequent meetings the Authority and Butler entered into a conspiracy whereby the Authority would refuse to allow the plaintiff to remain at Logan; that the Authority would also refuse to renew the Van Dusen lease,

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[8] It moved out in mid April 1961.

[9] 49 U.S.C. § 1349.

thus excluding both of these operators from the airport and that Butler would then take over their operations and become the sole and exclusive fixed base operator at Logan.

Defendants contend that the Authority in its operation of Logan is acting as an agent of the Commonwealth of Massachusetts in the performance of a governmental function, and that a restraint or monopoly resulting from governmental action does not violate the Sherman Act. They further contend that even if the Authority were acting in a purely proprietary capacity, its agreement to make Butler-Boston the sole supplier of fixed base services at the airport would still not have violated the antitrust laws.[10] This leads us to consider what sort of body the Authority really is. By statute[11] it has been constituted a public instrumentality and the exercise of the powers conferred upon it is deemed and held to be the performance of an essential governmental function. It also has wide powers,[12] many of which are bestowed only upon instrumentalities of government.

As stated by the Massachusetts Supreme Judicial Court in *Opinion of the Justices,* 334 Mass. 731 (1956), 136 N.E. 2d 223, the Authority "is in no sense a private or business corporation. . . . It has no stockholders. No person can derive a profit through its operations. Only the public is to be benefited. . . ." It is described in the act creating it as "a body politic and corporate" which expression the Court said "is appropriate to a corporation to which is

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[10] Defendants Butler-Boston and Butler Company also claim that the only conduct alleged against them is in connection with the Authority's exercise of a governmental function which is not subject to the antitrust laws. Butler Company also contends that the complaint should be dismissed against it because the requirements of venue are not met and the cause of action against it is barred by the statute of limitations, but we do not reach these questions.

[11] Mass. St. 1956 c. 465.

[12] See fn. 11.

entrusted some of the powers of the state for public purposes." In the opinion of the Massachusetts Supreme Judicial Court, the Authority is a corporation of that character. The court also characterized the Authority "as a purely public corporation for public purposes—an arm of the State—analogous to a municipal corporation." Logan Airport is and always has been a public project.[13]

In carrying out its responsibilities the Authority decided that it was necessary to have only one fixed base operation at Logan and pursuant to that decision, entered into the lease with Butler-Boston. It is clear that in doing so it was acting as an instrumentality or agency of the state, pursuant to the legislative mandate imposed upon it to operate and manage the airport and establish rules and regulations for its use. Plaintiff's contention that the Authority in operating Logan Airport is engaged in a purely proprietary capacity and is conducting a private business has no merit. Nor does the arrangement with Butler-Boston violate the Sherman Act. What was done here was in the exercise of a valid governmental function. The antitrust laws are aimed at *private* action, not at governmental action. As stated by the Supreme Court in *Parker* v. *Brown*, 317 U.S. 341, 350-51 (1943):

> "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature . . . . The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. . . ."

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[13] Ever since it opened in 1923 it has been under public management and control, first by the City of Boston, later by the Department of Public Works of the Commonwealth, then by the Airport Management Board, and since 1959 by the Authority.

Our courts have repeatedly reaffirmed this principle. *Mine Workers* v. *Pennington*, 381 U.S. 657 (1965); *Eastern R. Conf.* v. *Noerr Motors*, 365 U.S. 127 (1961); *U. S.* v. *Rock Royal Co-op.*, 307 U.S. 533 (1939); *Miley* v. *John Hancock Mutual Life Insurance Co.*, 148 F. Supp. 299, *aff'd*, 242 F.2d 758 (1st Cir. 1957), cert. denied, 355 U.S. 828.

Plaintiff attaches much importance to the fact that under the statute creating it, the Authority can sue and be sued in its own name. From this premise it jumps to the conclusion that the Authority is not immune from liability under the antitrust laws. We cannot agree with this conclusion. Every member of a state agency has an existence distinct from that of the state and can be sued in his own name. But in carrying out the official duties with which the state charges him, he acts for the state and his action is not subject to the antitrust laws. In other words, we do not reach any question of immunity, since there was no attempt on the part of Congress to impose liability in the first place.

Plaintiff also urges that the action of the Authority in leasing to Butler-Boston is subject to the antitrust laws because it was taken pursuant to a conspiracy with Butler. We do not find any conspiracy sufficiently alleged in the complaint. All that the plaintiff alleges is that the Authority agreed with Butler to replace Wiggins and Van Dusen with Butler and make Butler the sole and exclusive fixed base operator at Logan; that Butler-Boston was created to carry out that agreement, and the Authority entered into a lease with Butler-Boston under which the latter was to become the sole operator. These facts do not make out a case of conspiracy nor from them can any conspiracy be reasonably inferred. This was a simple agreement or arrangement. The fact that it was exclusive does not under these circumstances necessarily make it a

conspiracy or make it illegal. See *Donovan* v. *Pennsylvania Company*, 199 U.S. 279 (1905); *Parmelee Transportation Company* v. *Keeshin*, 292 F.2d 794 (7th Cir. 1961), cert. denied, 368 U.S. 944, rehearing denied, 368 U.S. 972 (1962). In this connection, it should be noted that the only conduct of the defendants, Butler or Butler-Boston, alleged to have been in violation of the antitrust laws had to do with their dealings with the Authority in the exercise of a governmental function. If, as we have found, the Authority's conduct was lawful here it would be an unreasonable restriction on its freedom to hold that the other defendants acted illegally in having aided it.

We agree with the district court that the complaint on its face does not state a claim upon which relief can be granted. No other points raised need be considered.

Affirmed.

JUDGMENT

June 15, 1966.

This cause came to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

(s) ROGER A. STINCHFIELD

Clerk.

Enter:

(s) ALDRICH, Ch.J.

Appendix B

Excerpts from Opinion of the Justices,
334 Mass. 731 (1956) 136 N.E. 2d. 223

1. SUMMARY OF ENABLING ACT, Mass. St. 1956 c. 465 set forth in the Opinion, pages 724-728

The summary relates to the then ". . . pending bill creating the Massachusetts Port Authority, hereinafter called the Authority, to take over, finance, and operate the existing East Boston vehicular tunnel, known as the Sumner tunnel, the State owned airports at East Boston and Bedford, the Mystic River Bridge, and the 'port properties,' consisting of piers and harbor facilities, and to finance, construct, and operate an additional crossing by bridge or tunnel between Boston proper and East Boston.

The bill comprises thirty closely printed pages, including in § 1 about five pages of definitions of the terms employed. We shall attempt to summarize only the portions of the bill that seem directly involved in the questions asked.

The Authority is to be 'placed in the department of public works,' but 'shall not be subject to the supervision or regulation of the department of public works or of any department, commission, board, bureau or agency of the commonwealth except to the extent and in the manner provided in this act.' It is described as 'a body politic and corporate.' It is 'constituted a public instrumentality and the exercise by the Authority of the powers conferred by this act shall be deemed and held to be the performance of an essential governmental function.' The Authority is to consist of seven members appointed by the Governor with the advice and consent of the Council for terms of seven years, with provision for staggered terms and for removal

of members by the Governor with the advice and consent of the Council for certain causes mentioned. § 2.

Among the powers granted to the Authority by § 3 are these:

To adopt by-laws for the regulation of its affairs and the conduct of its business, and to fix penalties not in excess of $100 for violation thereof.

To adopt an official seal.

To sue and be sued in its own name.

To extend, enlarge, improve, rehabilitate, lease as lessor or as lessee, maintain, repair, and operate the projects under its control, and to establish rules and regulations for the use of any such project, subject to exceptions as to the operation of aircraft and the powers of police officers not here material.

To issue its revenue bonds, payable solely from revenues.

To fix and to revise tolls, rates, fees, rentals, and other charges for the use of any project under its control, with certain qualifications not material here.

'To acquire, hold and dispose of real and personal property in the exercise of its powers and the performance of its duties under this act.'

'To acquire in its own name by purchase or otherwise, on such terms and conditions and in such manner as it may deem proper, or by the exercise of the power of eminent domain . . . . such public or private lands . . . as it may deem necessary for carrying out the provisions of this act; provided, that the Authority shall act in its name and on its behalf in exercising its functions under this clause. . . .'

To apply for and receive Federal grants.

'To make and enter into all contracts and agreements necessary or incidental to the performance of its duties . . . .''

Section 4 contains further power to acquire property by purchase 'and to take title thereto in the name of the

Authority,' and to acquire 'in its own name by purchase or otherwise' or to take by eminent domain real estate. Provision is made for the relocation or removal of tracks and public utilities.

'Title to the airport properties shall be vested in the Authority,' and possession shall be transferred to it upon the payment to the treasurer of the Commonwealth of the aggregate principal amount of certain bonds of the Commonwealth issued under certain previous enactments and of a sum equal to the aggregate cash payments under certain other previous acts. § 5.

'[T]itle to the port properties shall be vested in the Authority' and possession shall be transferred to it upon the issue of revenue bonds and the application of their proceeds under § 8, certain payments being made to the treasurer of the Commonwealth until there shall have been paid a sum equal to payments previously made by the Commonwealth under certain statutes and to the principal outstanding amounts of certain bonds of the Commonwealth issued under certain enumerated statutes, and interest thereon after the transfer. § 6.

By § 8 the Authority is given power to issue 'revenue bonds of the Authority' to provide funds for refunding the Mystic River Bridge revenue bonds, paying to the city of Boston $2,619,380 heretofore paid by the city for operating deficits of the Sumner tunnel, paying to the city $5,300,000, 'determined to be the amount,' in addition to the amount of other sums mentioned, 'due the city in payment of just compensation for the tunnel,' paying to the commissioners of sinking funds of the city the principal of outstanding tunnel bonds, paying the cost of the additional crossing, making the required payments to the treasurer of the Commonwealth for the airport properties, and making some other payments that need not be detailed here. This section further provides that the payments to the city of

Boston and its sinking fund commissioners for the Sumner tunnel shall be presumed to constitute just compensation for the tunnel, if accepted or not rejected by vote of the city council within sixty days after the effective date of the act.

'The principal of and the interest on all bonds issued under the provisions of this act shall be payable solely from the funds provided therefor from revenues as herein provided.' § 10. The bonds 'shall not be deemed to constitute a debt of the commonwealth or of any political subdivision thereof or a pledge of the faith and credit of the commonwealth or of any such political subdivision, but such bonds shall be payable solely from the funds herein provided therefor from revenues.' § 11.

The bonds are to be 'secured' by a trust agreement between the Authority and a corporate trustee with which the proceeds of the bonds shall be deposited and which shall make the payments hereinbefore mentioned. Subject to qualifications the trust agreement may pledge or assign the tolls and other revenues. § 12.

Upon the issuance of revenue bonds and the application of the proceeds as provided in § 8 'title to the Mystic River bridge and to the Sumner tunnel shall be vested in the Authority,' and 'said bridge and tunnel shall thereafter be maintained, repaired and operated by the Authority . . . .' § 13.

The authority is authorized to fix tolls, rates, fees, rentals and other charges, to be so fixed and adjusted as to provide a fund sufficient to pay current expenses, to meet sinking fund requirements for the outstanding tunnel bonds, to pay the principal and interest on all bonds to be issued under the act and for certain other payments mentioned in the act. 'Such tolls, rates, fees, rentals and other charges shall not be subject to supervision or regulation by any department, division, commission, board, bureau or agency of the commonwealth or any political subdivision thereof.' § 14.

All moneys received pursuant to the authority of the act shall be deemed trust funds to be held and applied solely as provided in the act. § 15.

The Authority shall not be required to pay any taxes or assessments upon any property acquired or used under the act or upon income therefrom, and the bonds issued under the act, their transfer, and the income therefrom, including profit on sale thereof, are to be free from taxation within the Commonwealth, with certain qualifications as to lands of the Authority leased for business purposes. § 17.

Under the heading 'Freedom from Competition' are provisions that so long as any bonds issued under the act are outstanding no bridge, tunnel, or ferry for vehicular traffic shall be constructed within certain limits by the Commonwealth or any political subdivision thereof or by any public instrumentality other than the Authority and no franchise shall be granted for any bridge, tunnel or ferry for such traffic. § 20.

The Authority is to be liable for injury or death by reason of defects or want of repair of its ways to the same extent as a municipal corporation would be liable. § 23.

When all payments due under § 6 shall have been made and all bonds issued under the act and interest thereon have been paid or a sufficient amount in trust has been set aside therefor, all projects under the control of the Authority 'shall be operated and maintained in such manner as may be provided by the general court.' § 25.

II. Interpretation of the Act.

The Court (pp. 733-734) more fully described the Authority as follows:

> "It is 'placed' in the department of public works, but only nominally so, since it is not to be subject to super-

vision or regulation in the ordinary sense of that or of any other department. § 2. Yet is it constituted 'a public instrumentality,' and the exercise of its powers 'shall be deemed and held to be the performance of an essential governmental function,' and this provision is consistent with the nature of the Authority's powers and duties in relation to airports, wharves, tunnels, and bridges, all of which have to do with the establishment and maintenance of means of public travel. Clearly these are matters of public concern. The further duties of investigation and report contained in § 3(f) and not hereinbefore summarized are largely incidental to the other duties and in any event do not detract from the public character of the Authority. On the other hand, there are other provisions that indicate strongly that the Authority is not merely a board or commission of the State government. It is to sue and be sued in its own name. §3(d). It is to acquire property in its own name, the title to which is to be in it and not in the Commonwealth. § 3(j), (k); §§ 4, 5, 6, 13. It is to make contracts (§ 3[o]) and to issue bonds (§ 8) which shall not be the bonds of the Commonwealth. § 11. It seems therefore that the Authority must constitute an entity in itself and must have an existence apart and distinct from that of the Commonwealth. *Johnson-Foster Co.* v. *D'Amore Construction Co.* 314 Mass. 416, 419. *Opinion of the Justices*, 322 Mass. 745, 751-753. In substance it has many important attributes of a corporation, and nothing other than a corporation would seem to satisfy the requirements of its being. But it is in no sense a private or business corportation. Its members are to be appointed by the Governor with the advice and consent of the Council. It has no stockholders. No person can derive a profit through its operations. Only the public is to be benefited. The

Authority therefore bears considerable analogy to a municipal corporation, although it can hardly be said to possess a territory of its own, and it exercises only limited governmental powers. It is described in § 2 as 'a body politic and corporate.' This expression is frequently used in city charters and is appropriate to a corporation to which is entrusted some of the powers of the State for public purposes. In our opinion the Authority would be a corporation of that character. See *Opinion of the Justices*, 330 Mass. 713."

Appendix C

FEDERAL AVIATION AGENCY

Exclusive Rights At Airports
Policy Statement

1. *Purpose.* It is the purpose of this Statement to set forth Agency policy on the conduct of aeronautical activities at public airports on which Federal funds, administered by the Agency, have been expended. It does not apply to the conduct of aeronautical activities by a governmental authority using its own employees, facilities and resources.

* * *

3. *Background.* Since the enactment of the Civil Aeronautics Act of 1938, there have been statutory prohibitions against the grant of an exclusive right to conduct an aeronautical activity at an airport on which Federal funds have been expended. The Policy Statement of July 17, 1962, identified the types of activities covered by the legislation and provided guidance as to the manner in which the law would be interpreted and applied. Based on the experience in applying this policy over the past three years, this Statement restates the Agency's interpretation of the legislation.

4. *Pertinent laws and regulations.* a. Section 308 (a) of the Federal Aviation Act provides that "there shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended." Identical language was contained in section 303 of the Civil Aeronautics Act of 1938.

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5. *Definitions.* For the purpose of this Policy Statement the following definitions apply:

a. *Exclusive right.* A power, privilege, or other right excluding or debarring another from enjoying or exercising a like power, privilege, or right. An exclusive right may be conferred either by express agreement, by imposition of unreasonable standards or requirements, or by any other means. Such a right conferred on one or more parties but excluding others from enjoying or exercising a similar right or rights would be an exclusive right.

b. *Aeronautical activity.* Any activity which involves, makes possible, or is required for the operation of aircraft, or which contributes to or is required for the safety of such operations.

The following activities, commonly conducted on airports, are aeronautical activities within this definition: charter operations, pilot training, aircraft rental and sightseeing, aerial photography, crop dusting, aerial advertising and surveying, air carrier operations, aircraft sales and services, sale of aviation petroleum products whether or not conducted in conjunction with other included activities, repair and maintenance of aircraft, sale of aircraft parts, and any other activities which because of their direct relationship to the operation of aircraft can appropriately be regarded as an "aeronautical activity."

The following are examples of what are not considered aeronautical activities: ground transportation (taxis, car rentals, limousines); restaurants; barber shops; auto parking lots.

* * *

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